IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of the Petition of
ZUSMAN FIERSTIEN
For a Writ of Habeas Corpus.

Zusman Fierstien,
Appellant,

vs.

Joseph A. Conaty, Acting District Director of the Immigration Service of the United States Department of Labor, in and for the Los Angeles, California District,
Appellee.

APPELLANT'S BRIEF.

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APPELLANT'S BRIEF.

This matter comes before the court on appeal from the District Court of the United States, Southern District of California. Appellant Zusman Fierstien is an alien, a native and citizen of Russia. He is a member of the Communist Party, which has been known in the United States under several names during the past ten years, and solely because of his membership in that political party he has been ordered deported from the United States by warrant of the Secretary of Labor. Habeas corpus proceedings were brought on the alien's behalf, and the District Court,

Honorable William P. James presiding, on November 29, 1929, ordered that the writ be discharged and the petitioner remanded to the custody of the immigration officers for deportation in accordance with the direction of the warrant of the Secretary of Labor.

The deportation proceedings were instituted by the Immigration Service of the Department of Labor at its Los Angeles office. A telegraphic warrant from Washington was the basis for the alien's arrest. There followed a hearing before Immigrant Inspector Albert Del Guercio of the Los Angeles office of the department, upon an order against the alien to show cause why he should not be deported. The legal foundation for the proceedings is the Federal Alien Anarchy Statute under which numerous proceedings have been brought in Southern California and in various parts of the country, the persons proceeded against being in nearly all cases members of the Communist Party. This is the recognized, legally functioning, political party which had its ticket in the field in about thirty-four states of the Union in the election campaign of 1928. Its candidates polled upwards of 50,000 votes. So far as we are informed, no attempt has been made anywhere in the United States to make it a crime to be a member of the Communist Party. And, of course, those members of the party who are citizens of the United States are not subject to deportation or to any attack under the Alien Anarchy Statute. The Department of Labor has, however, taken the position that the Communist Party stands for and advocates the overthrow by force and violence of our Government, the assassination of Government officers, the destruction of property, and sabotage, which we under-

stand also to mean, in substance, injury to or destruction of property.

So far as we have been able to ascertain, there never has been a decision by any of the Federal Courts that membership in the Communist Party of itself is sufficient basis for deportation. At his hearing on order to show cause the appellant admitted his membership in the Communist Party, which at that time was functioning under the name Workers' (Communist) Party. That was the party name at the time these proceedings were had. Since then the party has adopted the name Communist Party of the U. S. A. In its earlier years the party used the name Communist Labor Party, and a little later it was known as the Workers' Party.

By whatever name it may be known, the Communist Party is unpopular in America. Its members and its leaders are agitators. They have come into conflict with the police in various parts of the country from time to time. Most recently, they attracted nation-wide, and perhaps world-wide, notice by their attempts to lead unemployment demonstrations in many cities on February 26 and again on March 6, 1930. In a few cities, notably San Francisco, Oakland and Baltimore, they were allowed by the police to parade and to indulge in soap-box oratory and to disperse in peace. But in other cities, including Los Angeles and New York, the police, by force and violence, prevented their attempted meetings and speech-makings, and it is common knowledge that a good many men went to the hospital with broken heads. It is not known how many of the agitators were citizens and how many were aliens. It appears that no favoritism was shown, and that citizens as well as aliens were clubbed by the police.

This brief reference to recent events is made here by way of sketching the background and the quite general attitude of our governmental authorities toward the members of this despised minority. It has been demonstrated repeatedly that it is only from the courts, and not from policemen or juries or even inspectors of the Immigration Department, that hated political and industrial agitators can hope for just and lawful treatment.

We respectfully suggest that this case is important particularly because of the need, in this critical time, of calm and dispassionate and judicial solutions of the pressing political problems which confront the Nation.

In this brief we shall contend that the decision of the District Court must be reversed for the following reasons, as set forth in our assignment of errors:

First: Because petitioner was not given a fair hearing before the Immigration Service and the Department of Labor.

Second: Because evidence was used against petitioner which had been taken from his possession illegally.

Third: Because the evidence was not sufficient to sustain the charges made and the issuance of the warrant of deportation.

Fourth: Because the findings upon which the warrant of deportation was based are in the alternative, and therefore no findings at all.

Fifth: That the record before the court is admittedly incomplete, since none of the exhibits received at the hearing as shown by the record, is included in the record.

I.

Petitioner Was Not Given a Fair Hearing Before the Immigration Service and the Department of Labor.

Although deportation proceedings are brought against aliens, who have no rights as citizens, the law requires that a fair hearing must be accorded. In *Ungar v. Seaman,* 4 F. (2nd) 80, it is held that the right to a fair hearing includes the right to:

> "1. A definite charge with opportunity to the alien to read same.
> 2. Right of counsel.
> 3. Right to cross-examine.
> 4. Only competent evidence to be used."

We submit that the proceedings herein are not based upon a "definite charge". The indefiniteness of the charge is immediately apparent. As stated in the petition for writ of habeas corpus [Tr. p. 4], and again in the return to the writ [Tr. pp. 11 and 12], the charge upon which the warrant of deportation is based is as follows:

> "That he has been found in the United States in violation of the Immigration Act of October 16, 1918, as amended by the Act of June 5, 1920, in that he is a member of or affiliated with an organization, association, society, or group that writes, circulates, distributes, prints, publishes or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purposes of circulation, distribution, publication, issue or display, written or printed matter advising, advocating or teaching the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any

other organized Government; that he is a member of or affiliated with an organization, association, society or group that writes, circulates, distributes, prints, publishes, or displays or causes to be written, circulated, distributed, printed, published or displayed or that has in its possession for the purpose of circulation, distribution, publication, issue or display, written or printed matter advising, advocating or teaching the unlawful damage, injury or destruction of property; and that he is a member of or affiliated with an organization, association, society, or group that writes, circulates, distributes, prints, publishes or displays, or causes to be written, circulated, distributed, printed, published or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, written or printed matter advising, advocating or teaching sabotage."

In his findings, the Inspector recommends the deportation of the alien upon the foregoing charges, and the additional charges:

"That he is a member of our affiliated with an organization, association, society, or group, that advises, advocates or teaches opposition to all organized government; that he is a member of or affiliated with an organization, association, society, or group, that believes in, advises, advocates, or teaches the overthrow by force or violence of the Government of the United States, or of all forms of law."

All of the foregoing charges are stated in the alternative and disjunctive. Certainly they are not "definite". We shall touch upon this point briefly again when we discuss the proposition that the findings are in the alternative, and in effect no findings at all.

The right to cross-examine, included by the Supreme Court in *Ungar v. Seaman, supra,* as a right which may not be denied the alien, was denied the appellant by the

Immigrant Inspector who stated at page 14 of the Inspector's Transcript:

> "For the purpose of the record, I wish to state I was present at the time and I asked the alien to come to the Immigration office; and the arrest was not made by Lieutenant Hynes; but he was asked to come to our office for an investigation in regard to his right to be and remain in the United States. You may proceed with the question to the witness.
>
> By Attorney: I want to ask you a question now.
>
> By Inspector Del Guercio: I will not answer you any question; I am not on the stand.
>
> By Attorney: But you want us to understand police officers did not arrest Fierstien, but you did?
>
> By Inspector: The record clearly shows that.
>
> By Attorney: I will ask Officer Hynes who arrested this man?
>
> A. I did on the charge of suspicion of Criminal Syndicalism."

Here we have an Immigrant Inspector acting in the triple capacity of arresting officer, prosecuting officer and judge. It might well be said that he acted in a fourth capacity, that of witness. Detective Lieutenant Hynes testified that he had arrested the alien on an occasion when in company with Inspector Del Guercio (who was conducting this hearing) he went to the alien's residence in connection with the case of Frank Spector, another alien against whom deportation proceedings were brought. The inspector himself flatly contradicted Officer Hynes and seemed to clinch the point that as a Government inspector he had participated in a raid without a search warrant upon the alien's premises, and in the arrest of the alien without a warrant. Counsel sought by cross-examination

of the inspector to clarify the situation so that there might be no doubt that Inspector Del Guercio had made the arrest. Having made the arrest, and having made unsworn statements of facts into the record, and having refused to submit to cross-examination, it was manifestly unfair that Inspector Del Guercio should be permitted to act as prosecutor and as quasi-judge. As such, he was in a position to approve, by his findings and recommendations to the department, his own illegal and unjustifiable participation in a raid without a search warrant and an arrest without a warrant. Who could be so naive as to expect Inspector Del Guercio, sitting as judge, to repudiate the conduct of Inspector Del Guercio acting as policeman?

"Only competent evidence to be used" is the fourth indispensable element of a fair hearing as laid down by the Supreme Court in *Ungar v. Seaman, supra.* All of the evidence seized in the raid, by Inspector Del Guercio and Police Lieutenant Hynes, upon the alien's premises, was received in evidence over the objection and against the protest of counsel. As stated by Judge James in his opinion and order, the objection to the evidence and the demand for its return were seasonably made. This demand was refused. The Reviewing Officer in the Department of Labor in his decision stated that because of this objection and demand for the return of the evidence, he had discarded the evidence and was not influenced by it in his decision. And yet he proceeded to refer to the evidence as support for his findings and the warrant of deportation. (We have not been afforded a copy of the departmental decision and cannot cite the page and line of the reviewing officer's comment.)

II.

Evidence Was Used Against Petitioner Which Had Been Taken From His Possession Illegally.

This point has been discussed to some extent in the foregoing paragraph I on the subject of the unfairness of the hearing. It is the habit of immigration inspectors to employ the assistance of local police in obtaining evidence against aliens, and afterwards to admit the evidence upon the ground that if the evidence was seized illegally it was seized by others than federal employees, for whose conduct the Government is not responsible.

In the present case, however, the proof clearly shows that the Government's own employee had participated in the unconstitutional and illegal search and seizure and arrest. This, of course, under the decisions of the Supreme Court, was error. And we submit that the court will hardly approve the action of the reviewing officer at Washington in using the evidence thus received in arriving at his decision, and failing to include the exhibits in the record submitted to the court.

III.

The Evidence Was Not Sufficient to Sustain the Charges Made and the Issuance of the Warrant of Deportation.

Upon this point alone, we submit, the decision herein would have to be reversed if there were no other error. The court will observe that the warrant of deportation is based upon findings which boil down to this:

That the alien is a member of an organization which advocates the unlawful assaulting or killing of any officers,

and which advocates the unlawful damage, injury or destruction of property, and which advocates sabotage.

The two additional charges are:

Membership in an organization which advocates opposition to organized Government and membership in an organization which advocates the overthrow by force or violence of the Government.

These two additional charges were discarded by the Secretary of Labor, although the Immigrant Inspector in his findings and recommendation held that those charges also had been proved. Judge James in his opinion and order discharging the writ of habeas corpus, seems to rest entirely upon the testimony of Lieutenant Hynes that in his opinion the Communist Party teaches and advocates the overthrow of the Government of the United States and of all organized government by force and violence. [Tr. p. 21.] The trial judge then cites cases in support of the proposition of law that if by an examination of the testimony heard by the immigration officers, it can be said that there is any substantial evidence warranting the conclusions drawn, the decision must be sustained, and the courts will allow for every reasonable implication to be drawn by such officers from the evidence presented. [Tr. p. 22.]

The difficulty is that the evidence quoted by the trial judge was evidence in support of an entirely separate and independent charge against the alien, which charge the reviewing officer had discarded. There is nothing in the testimony of Lieutenant Hynes touching at all any one of the charges upon which the warrant of deportation is based. Lieutenant Hynes said nothing about the unlawful assaulting or killing of officers, or the unlawful damage or

injury or destruction of property, or sabotage. Nor did any other witness touch upon or even hint at either of those three subjects. It is conceivable that the papers, pamphlets, and books received in evidence by the inspector and discarded by the reviewing officer, and not furnished to the court, with the record, might have contained language which would tend to support those charges. If they did, it is manifest that none of such exhibits or their contents may be considered here.

IV.

The Findings Upon Which the Warrant of Deportation Was Based Are in the Alternative, and Therefore No Findings at All.

As his basis for the order of deportation, the Secretary of Labor makes his findings in the language of the statute and of the charges against the alien in the order to show cause why he should not be deported. It is found that the alien "is a member of *or* affiliated with an organization, association, society, *or* group that writes, circulates, distributes, prints, publishes, *or* displays, *or* causes to be written * * * *or* that has in its possession for the purpose of circulation * * *." Nowhere is there a specific finding of a specific fact.

In *Ex Parte Rodriguez*, 15 Fed. (2nd) 875, there was a finding that the alien was convicted of or admitted the commission of a crime involving moral turpitude.

Of this the court said:

> "That the finding of the secretary on this point is too indefinite to support the warrant I think clear, because the finding is in the alternative, and therefore meaningless, since it does not find either that he has

been convicted of, or that he admits, but finds that he did one or the other, which is in effect no finding." (879.)

V.

The Record Before the Court Is Admittedly Incomplete, Since None of the Exhibits Received at the Hearing as Shown by the Record, Is Included in the Record.

The Secretary of Labor has seen fit to withdraw from the record before transmitting it from Washington to the clerk of the District Court, the various parcels of printed matter taken from the alien's place of residence and introduced against him as exhibits in support of the charges. Yet, in his written opinion which accompanies the findings sustaining the charges against the alien, the reviewing officer comments upon the nature of the Workers' (Communist) Party, as indicated by the exhibits. The exhibits were received in evidence over the objection of counsel for the alien. They were shown to have been seized without a search warrant and in violation of the Federal Constitution in the presence of, if not with the actual participation of a Government immigration officer. The Honorable Secretary seeks to overcome that objection by omitting the exhibits from the record. Presumably the contents of those exhibits would afford the court a basis in some measure in determining whether or not the alien's political party does stand for the assassination of Government officers or the destruction of property. The court is not permitted to study those exhibits. Possibly they contain a complete refutation of the charges upon which the warrant is based. Conceivably they contain vigorous exhortations against all violence. How is the court to know what this political

party advocates if the court is not allowed a glimpse of the party's printed enunciations of principles.

It would seem that no authority need be cited in support of the proposition that no record of proceedings which is manifestly incomplete can be construed as supporting the warrant of deportation.

In *Kwock Jan Fat v. White*, 253 U. S. 454, reversing 255 Fed. 323, the United States Supreme Court overruled the demurrer to a petition for a writ of habeas corpus. One ground for this was that important evidence had been omitted from the record, so that a "full record" was not "preserved of the essentials on which the executive officials proceed to judgment". In that case at page 464, the Supreme Court said:

> "For failure to preserve such a record for the information, not less of the Commissioner of Immigration and of the Secretary of Labor than of the courts, the judgment in this case must be reversed."

To the same effect see also *In Re Can Pon,* 161 Fed. 618, 623, affirmed 168 Fed. 479.

For the foregoing reasons it is respectfully submitted that the order of the District Court must be reversed and the appellant discharged.

Respectfully submitted,

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Attorney for Appellant.